No. 87-1729

(15)

In the Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether assets that are otherwise subject to criminal forfeiture under the drug forfeiture statute, 21 U.S.C. 853 (Supp. IV 1986), are exempt from forfeiture if the defendant wishes to use them to pay counsel to represent him in the criminal prosecution.

2. Whether, if the statute does not exempt such assets from forfeiture, the district court may nevertheless exclude them from an order of forfeiture as a matter of equitable discretion.

3. Whether, if the statute does not exempt such assets from forfeiture and the district court may not exclude them as a matter of equitable discretion, the statute is unconstitutional under the Fifth or Sixth Amendment where it has the effect of rendering the defendant financially unable to pay the fee charged by the attorney he wants to represent him in the criminal case.

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OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-29a) is reported at 837 F.2d 637, and the opinion of the panel of the court of appeals (Pet. App. 30a-80a) is reported at 814 F.2d 905. The opinion of the district court (Pet. App. 81a-92a) is reported at 631 F. Supp. 1191.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 11, 1988 (J.A. 9). On February 26, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 11, 1988, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 7, 1988 (J.A. 99). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments of the United States Constitution and 21 U.S.C. (Supp. IV) 853 are reproduced at App., *infra*, 1a-10a.

STATEMENT

1. The federal drug forfeiture statute, 21 U.S.C. 853 (Supp. IV 1986), created a broad forfeiture remedy against narcotics traffickers. Section 853(a) provides that a person who is convicted of engaging in a continuing criminal enterprise shall forfeit to the United States any property derived from his narcotics activities and any property affording him a source of control over the enterprise. Section 853(c) provides that the forfeiture becomes effective at the time of "the commission of the act giving rise to forfeiture." Under that subsection, even if the defendant subsequently transfers the property to a third party, the property may still be the subject of a special verdict of forfeiture and, if such a verdict is returned, "shall be ordered forfeited to the United States." 21 U.S.C. 853(c) (Supp. IV 1986). Section 853(e)(1) authorizes the court to issue a pretrial restraining order to prevent the defendant from transferring property that would in the event of conviction be subject to forfeiture under Section 853(a).

If the defendant is convicted and the district court enters an order of forfeiture, a third party may then petition the court to amend the order of forfeiture to exclude particular property if he establishes either (A) that he had an interest in the property that was superior to the inte est of the defendant at the time the defendant committed the act giving rise to forfeiture, or (B) that he was a bona fide purchaser of the property for value and was reasonably without cause to believe that it was subject to forfeiture. 21 U.S.C. 853(n)(6) (Supp. IV 1986).

2. On January 15, 1985, Christopher F. Reckmeyer, II, was charged in an indictment filed in the United States District Court for the Eastern District of Virginia. The indictment alleged that Reckmeyer was the head of a massive drug operation. J.A. 28-40. Count 2 of the indictment charged Reckmeyer and two others with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (J.A. 32-33). Count 2 also sought forfeiture under Section 853 of any profits the three defendants obtained as a result of their participation in the continuing criminal enterprise and any interests in property that afforded them a source of influence over the enterprise (J.A. 33). Specific assets subject to forfeiture were then listed in 41 succeeding paragraphs of the indictment (J.A. 33-40). See Pet. App. 4a, 31a.

The day before the indictment was returned, the district court entered an ex parte order pursuant to 21 U.S.C. 853(e)(1)(A) (Supp. IV 1986) restraining the transfer of assets by Reckmeyer (J.A. 11-27). Two months later, Reckmeyer moved to modify the restraining order to exclude assets that he wished to use to pay petitioner, the law firm of Caplin & Drysdale, and Stanley J. Reed, a member of another firm who had been retained to assist petitioner in representing Reckmeyer in the criminal case (J.A. 43-48). In particular, the motion requested the court to set up a procedure under which counsel "will be paid for ongoing services rendered and costs incurred in Reckmeyer's defense out of Reckmeyer's funds presently in the possession of the government or in the possession of third parties but frozen pursuant to the Court's restraining order of January 14, 1985" (J.A. 48).[1]

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[1] On the day before the indictment was returned, Reckmeyer had given petitioner two checks in the amount of $5000 each in partial payment for services rendered prior to that date. After the checks were

On March 14, 1985, before a hearing was held on Reckmeyer's motion to modify the retraining order, Reckmeyer pleaded guilty to the CCE count and two tax evasion counts (Pet. App. 82a). The government's factual statement accompanying the agreement stated that Reckmeyer's organization was responsible for the distribution of more than 169 tons of marijuana and 10 tons of hashish over the course of 50 ventures. Although Reckmeyer disputed some of the facts in the government's statement, he admitted that he had realized millions of dollars from drug transactions, which were his only significant source of income. *Id.* at 4a; see *United States* v. *Reckmeyer,* 786 F.2d 1216, 1219-1222 (4th Cir.), cert. denied, 479 U.S. 850 (1986). As part of the plea arrangement, Reckmeyer agreed to the forfeiture of the assets specifically listed in the indictment, as well as any proceeds from those assets and all other assets that were the proceeds of his drug activities or were directly or indirectly related to those activities (*id.* at 1217). His guilty plea and agreement to forfeit the listed property were "unconditional," and did not reserve any of the covered assets from forfeiture (J.A. 51).

The next day, the district court denied the pending motion to modify the restraining order (J.A. 49-56). The court concluded that Reckmeyer's guilty plea, including

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deposited, however, they were returned unpaid because the restraining order had frozen the funds in the account on which they were drawn (J.A. 52-53, 67-68; Pet. App. 39a, 82a). In addition, after Reckmeyer's surrender, petitioner notified the court on January 25, 1985, that it had received approximately $25,000 from Reckmeyer toward the payment of fees owing for prior services (most of which apparently were performed before the indictment was returned) and had deposited those funds in an escrow account (J.A. 41-42). Reckmeyer's motion to modify the restraining order sought permission to receive the funds placed in escrow and to redeposit the two $5000 checks (J.A. 47-48), in addition to seeking payment from other assets.

the provision for forfeiture of the listed assets, removed any basis for the court to modify the restraining order to release funds to Reckmeyer so that he in turn could transfer them to petitioner in payment of attorneys' fees. In the court's view, petitioner instead should seek relief in its own right by filing a post-conviction petition under subsection (n) of Section 853 requesting to be paid its fees out of the property that was forfeited to the United States (J.A. 51, 52-53). The court explained (J.A. 54-55):

> The temporary restraining order was a pendente lite type of relief to freeze things until there could be some adjudication under Count 2. There has now been that adjudication. I don't think modification of the temporary restraining order, assuming it is still extant, affects whether those sums are forfeitable or not. * * * I think there is a statutory remedy for a third-party claim against what the Government undertakes to forfeit or forfeits; and I think that's the remedy you will have to pursue.

On May 17, 1985, the court sentenced Reckmeyer to a term of 17 years' imprisonment and entered a Consent Decree for Forfeiture that included virtually all assets possessed by Reckmeyer, including real estate, gems, and $200,000 in currency (J.A. 57-65). See Pet. App. 39a, 82a-83a; *United States* v. *Reckmeyer,* 786 F.2d at 1217 n.1.

3. After the district court sentenced Reckmeyer and entered the consent order of forfeiture, petitioner filed a third-party petition under Section 853(n), requesting the court to amend the order of forfeiture to exclude sufficient property to pay $170,512.99 in fees and expenses attributable to its representation of Reckmeyer (J.A. 66-69;

see Pet. App. 39a, 82a-83a). The government opposed petitioner's request (J.A. 70-89).

At a hearing on the motion in early November 1986 (J.A. 90-97), petitioner conceded that it was not entitled to relief under subsection (n)(6)(B). That was so, petitioner stated, because although the firm would qualify as a bona fide purchaser, it could not satisfy the burden of showing that it was without reasonable cause to believe that the proceeds were subject to forfeiture (J.A. 93). Because the statutory basis for relief under subsection (n)(6)(B) was unavailable, petitioner acknowledged that it had the "heavy burden" of convincing the court that the forfeiture statute was not intended to apply at all in the situation where a law firm seeks payment of its fees out of property that has been declared forfeited to the United States (J.A. 93).

In an order dated March 27, 1986, the district court granted petitioner's motion and amended the order of forfeiture "to reflect that the firm of Caplin & Drysdale has legal right, title, and interest in the sum of $170,512.99 out of the forfeited assets of Christopher Reckmeyer" (J.A. 98). In its accompanying opinion, the court held, as a matter of statutory construction, that assets used to pay attorneys' fees are exempt from forfeiture under Section 853 (Pet. App. 81a-92a).[2] The court acknowledged that a literal reading of the statute encompasses assets that might be used to pay legal fees, because it provides for the defendant to forfeit " 'any property' " that constitutes the proceeds of or was used to facilitate the criminal activity

[2] The district court characterized petitioner as "a good faith provider of services for value" and observed that petitioner "ha[d] not been paid for these charges because of the restraining and forfeiture orders which encompassed all of Christopher Reckmeyer's assets" (Pet. App. 83a).

and " 'any of his interest in' " the CCE enterprise (Pet. App. 87a, quoting 21 U.S.C. 853(a) (Supp. IV 1986)). But the court concluded that such a construction would violate a defendant's Sixth Amendment right to obtain counsel of his choice and would deprive the defendant of the effective assistance of counsel by giving rise to a conflict of interest as a result of the attorney's pecuniary interest in the outcome of the case (Pet. App. 88a-92a).

4. On the government's appeal, a panel of the court of appeals affirmed the district court's order excluding the $170,512.99 from forfeiture (Pet. App. 30a-80a). The panel first held, contrary to the district court's view, that Section 853 *does* apply to assets that a defendant intends to use to pay his attorney (*id.* at 41a-52a). In the panel's view, the language of the relevant forfeiture provisions "is so clear and so plainly reaches property legitimately contracted to be paid or paid as attorneys fees as not to permit judicial resort to legislative history" (*id.* at 42a; see *id.* at 32a-36a). The panel further concluded that "even if resort to legislative history were made, examination of that history would reveal no such clear intent to exclude property marked for or paid as attorney fees as would be required to compel such an interpretation, and indeed would tend rather to confirm the contrary intention reflected in the plain statutory language" (*id.* at 42a; see *id.* at 45a-52a). In particular, the panel held that passing references in the legislative history to Congress's insistence that defendants not avoid forfeiture by entering into " 'sham' " or " 'fraudulent' " transactions did not confine the broad language of the statute to those particular situations (*id.* at 46a-47a, quoting S. Rep. No. 225, 98th Cong., 1st Sess. 200-201, 209 n.47 (1983)). In the panel's view, that interpretation would ignore the carefully drawn exceptions to forfeiture under Section 853(n), which are

limited to claims by third parties who had an interest in specific property that was superior to that of the defendant at the time he committed the act giving rise to forfeiture and claims by third parties who were bona fide purchasers of the property without reasonable cause to believe that the property was subject to forfeiture (Pet. App. 46a-50a).

The panel next rejected the contention that the forfeiture provisions should be held unconstitutional because of the possibility that in some circumstances the potential for forfeiture of assets might give rise to a conflict of interest on the part of the attorney or otherwise affect his relationship with the defendant. The panel reasoned that such claims of ineffective assistance of counsel should be decided on the basis of the facts in an individual case, if the defendant was convicted. Pet. App. 59a-61a.

The panel held, however, that the statutory forfeiture provisions are unconstitutional to the extent that they apply to assets that the defendant uses or proposes to use to pay what the panel termed "legitimate" attorneys' fees. In the panel's view, the prospect that assets might be subject to a restraining order prior to trial, and to an order of forfeiture after conviction, would deter an attorney from accepting the case and would thereby impermissibly interfere with the defendant's Sixth Amendment right to retain counsel of his choice. Pet. App. 61a-73a.

5. The full court of appeals granted the government's petition for rehearing en banc and reversed the district court's order excluding from forfeiture the $170,512.99 that petitioner sought to recover for its representation of Reckmeyer (Pet. App. 1a-29a). As a threshold matter, the en banc court unanimously agreed with the panel that Section 853 does not exempt from forfeiture those assets that the defendant would like to use to pay attorneys' fees (Pet.

App. 5a-7a; *id.* at 26a (Phillips, J., dissenting)). In the en banc court's view, the statutory language is "unmistakably clear" and "plainly reaches property used or intended to be used for attorneys' fees" (*id.* at 5a). The court noted that the statutue makes no mention of attorneys' fees in the definition of property that is subject to forfeiture, 21 U.S.C 853(a) and (b) (Sup. IV 1986), or in the exceptions for certain third-party claims, 21 U.S.C. 853(n) (Supp. IV. 1986), but rather "exempts only those third parties who have prior claims or are bona fide purchasers, without regard to whether they are attorneys" (Pet. App. 6a). The en banc court also agreed with the panel that "the legislative history provides no basis for concluding that attorneys' fees are not subject to forfeiture" (*id.* at 5a), because the disapproval of "sham" transactions in the legislative history "cannot * * * legitimately be used to restrict statutory language that is unambiguously more broad" and because "limiting forfeiture to assets transferred in sham transactions would read the bona fide purchaser requirement right out of the statute" (*id.* at 6a).

In contrast to the panel, however, the en banc court held that applying the forfeiture provisions to assets the defendant wishes to transfer to his attorney does not violate the defendant's Sixth Amendment right to counsel (Pet. App. 8a-22a). The court first stressed that the forfeiture statute "poses no threat whatsoever to the absolute right to be represented by counsel" (*id.* at 8a), because, if necessary, "the defendant's right to representation will be protected by the appointment of counsel" (*id.* at 9a; see *id.* at 8a-10a).

The court also concluded that the forfeiture provisions do not impermissibly interfere with a defendant's qualified right to counsel of his choice (Pet. App. 11a-16a), which is necessarily "limited by the government's interest in the

orderly administration of justice" (*id.* at 11a). The court observed that prior decisions concerning the right to counsel of choice had involved situations in which the defendant sought to retain counsel by spending his *own* assets; under the drug forfeiture provisions, by contrast, the assets are "an integral part of the very crime with which the defendant is charged" and therefore constitute property "in which the law recognizes no ownership rights of the defendant" (*id.* at 12a). The court also pointed out that there are "multitudinous circumstances" that might leave a defendant without the attorney he would most prefer: the attorney might not want to represent the defendant or might be concerned that the defendant will not be able to pay his fee, perhaps because a creditor had obtained liens against his property; or the court's schedule or rules requiring the hiring of local counsel might not allow for representation by a particular lawyer (*id.* at 13a). In the court's view, the effect of the forfeiture provisions in divesting a participant in a continuing criminal enterprise of any interest he might have in property associated with the enterprise is simply another event that may have the effect of preventing a defendant from choosing a particular lawyer, without constituting a deprivation of the qualified right to counsel of choice that is protected by the Sixth Amendment. The court thus "decline[d] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (*id.* at 15a).[3]

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[3] Judge Phillips, joined by Chief Judge Winter and Judges Sprouse and Ervin, dissented (Pet. App. 26a-29a). They concluded that although Section 853 applies to assets that the defendant wants to use to pay an attorney (Pet. App. 26a), the statute is unconstitutional to that extent because the Sixth Amendment prohibits a court from issuing a restraining order or an order of forfeiture that has the effect of preventing the defendant from using covered assets to retain counsel of his choice (Pet. App. 26a-29a).

SUMMARY OF ARGUMENT

I. The federal drug forfeiture statute, 21 U.S.C. 853, (Supp. IV 1986), does not permit petitioner, a law firm, to recover a debt owed to it by a criminal defendant from assets that have been forfeited to the United States. Under the statute, a third party holding property that is subject to an order of forfeiture entered in a criminal case can obtain relief from the forfeiture only if the third party had a superior ownership interest in the property at the time the defendant committed the criminal act that gave rise to the forfeiture, or if the third party was a bona fide purchaser for value who was reasonably without cause to believe that the transferred assets were subject to forfeiture.

Petitioner concedes that it can meet neither test. It argues, however, that it should be entitled to recover the funds that the defendant owes it, because those funds should never have been made the subject of a restraining order and should never have been incorporated in the final judgment or forfeiture in this case.

A. As an initial matter, the argument petitioner is making is open, if at all, only to the defendant in the criminal case; any error in the final judgment of forfeiture can be corrected only at the behest of the defendant. A third party such as petitioner is relegated under the forfeiture statute to seeking to establish in proceedings brought under 21 U.S.C. 853(n)(6) (Supp IV 1986) that it is a bona fide purchaser for value without notice of the forfeitability of the funds. Petitioner may not raise the rights of the defendant under other provisions of the statute, particularly when the defendant has specifically waived any objection to the order of forfeiture.

B. In any event, the portions of the statute on which petitioner relies do not establish a basis for recovering the fees the defendant owes to petitioner. Contrary to petitioner's contention, Section 853(c), which governs the forfeitability of property in the hands of third parties, does not give the district court a general dispensing power to order attorneys' fees or other expenses to be paid to third parties out of the forfeited assets. Section 853(c), like Section 853(a), provides that forfeiture is mandatory. Under Section 853(c), if the defendant is convicted and the jury returns a special verdict of forfeiture with respect to particular property, a third party can establish rights to that property only in the two narrow circumstances specified in Section 853(n)(6), neither of which benefits petitioner.

There is no merit to petitioner's contention that the provision of the forfeiture statute governing restraining orders, 21 U.S.C. 853(e)(1) (Supp. IV 1986), imposes a duty on district courts to exclude amounts necessary to pay "ordinary living expenses," including attorneys' fees, from the restraining order and ultimately from the final order of forfeiture. Section 853(e)(1) serves a very limited purpose: to preserve forfeited assets from dissipation during the pendency of the criminal proceeding. It does not provide a means of diverting forfeited assets to defendants or third parties for particular purposes. While Section 853(e)(1) provides district courts with discretion to enter, deny, or limit restraining orders as the need indicates, the hardship of a particular forfeiture to a defendant is not a consideration that bears on the propriety of a restraining order after the indictment is returned, and nothing in Section 853(e)(1) requires the court to exempt from the final order of forfeiture any assets that were not included within the reach of the restraining order, as petitioner contends.

II.A. There is no constitutional bar to the forfeiture in this case. The Sixth Amendment guarantees a defendant the right to the assistance of counsel. Thus, as long as the defendant is provided with representation by a competent attorney, there is nothing in the Sixth Amendment that requires that the defendant be permitted to use funds that are subject to forfeiture to hire the attorney of his choice. Petitioner argues that if the forfeiture in this case is upheld, attorneys will not agree to represent defendants in cases in which forfeitures are sought, because of the risk that all of the defendant's assets will be forfeited and the defendant will not be able to pay his fee. That will occur, if at all, only in cases in which the defendant has no legitimate assets with which to pay his attorneys, since it is only tainted assets that are subject to forfeiture. And the Sixth Amendment does not grant a criminal defendant the right to retain counsel with assets in which the defendant has no legitimate property interest. The policy of preventing narcotics traffickers from taking advantage of the economic power that their criminal conduct grants them overcomes any indirect interference that the forfeiture statutes may effect in the defendant's effort to obtain counsel of his choice.

B. Nor does the drug forfeiture statute violate due process. If there are instances in which prosecutors abuse the forfeiture statute in an effort to deprive defendants of their chosen counsel or otherwise deny them a fair trial, those cases can be addressed as they arise. For the same reasons that the forfeiture statutes do not deprive defendants of their constitutional right to the assistance of counsel, the statutes do not deprive defendants of their right to fair criminal proceedings in general.

ARGUMENT

I. THE FEDERAL DRUG FORFEITURE STATUTE DOES NOT AUTHORIZE PETITIONER TO RECOVER ATTORNEYS' FEES FROM FORFEITED ASSETS

In contending that the forfeiture statute furnishes it with a basis for recovering $170,513 from the property Christopher Reckmeyer forfeited to the United States, petitioner has all but abandoned the principal statutory argument it advanced in the courts below and in the certiorari petition (see Pet. i, 9 n.5, 20-22)—namely, that the forfeiture sanction in Section 853 does not apply to those tainted assets that the defendant uses or wants to use to pay the fee of the attorney who represents him in the criminal prosecution. See Br. 27 n.14.

The argument that Section 853 excludes assets used to pay attorneys' fees from the "property" that is subject to forfeiture under Section 853 was unanimously rejected by the en banc Fourth Circuit in this case;[4] it was unanimously rejected by panels of the Seventh and Tenth Circuits;[5] it was unanimously rejected by the Second Circuit panel in *Monsanto*; and it was not endorsed by any member of that court on rehearing en banc.[6] In view of that array of authority, it is not surprising that petitioner has chosen

[4] Pet. App. 5a-7a; *id.* at 26a (Phillips, J., dissenting); *id.* at 41a-53a (panel opinion).

[5] *United States* v. *Moya-Gomez*, 860 F.2d 706, 722-723 (7th Cir. 1988); *United States* v. *Nichols*, 841 F.2d 1485, 1491-1496 (10th Cir. 1988); *id.* at 1509 (Logan, J., dissenting).

[6] *United States* v. *Monsanto*, 836 F.2d 74, 78-80 (1987) (88-454 Pet. App. 55a-60a), on rehearing en banc, 852 F.2d 1400, 1402 (1988) (Feinberg, C.J., concurring); *id.* at 1405 (Winter, J., concurring); *id.* at 1411 (Miner, J., concurring and dissenting); *id.* at 1412-1413 (Mahoney, J., dissenting); *id.* at 1420 (Pratt, J., concurring and dissenting) (88-454 Pet. App. 4a, 11a, 24a, 28a, 44a).

not to rest its case on that theory here.[7] The respondent in *Monsanto*, however, continues to press that argument (see 88-454 Resp. Br. 12-30), and we have therefore addressed it in our brief in that case (at 16-36).

Petitioner instead seizes on the novel argument advanced by three concurring judges on rehearing en banc in the *Monsanto* case. See 852 F.2d 1400, 1405-1411 (2d Cir. 1988); 88-454 Pet. App. 10a-23a. That argument requires petitioner to look behind the final judgment of forfeiture and to challenge the restraining order that the district court had previously entered in the case. Petitioner's new argument proceeds as follows: First, he argues (Br. 12-28) that the language in Section 853(e)(1)(A) stating that a court "may" issue a postindictment restraining order or take other appropriate action to preserve the availability of assets for forfeiture upon conviction vests the court with equitable discretion. Petitioner then converts the "may" into a "must" by arguing that the court *must* exercise that discretion in a manner that exempts from pretrial restraint any property the defendant wants to use to pay "ordinary" living expenses, including attorneys' fees. Second, petitioner points to language in Section 853(c) stating that tainted property that was transferred by the defendant to a third party nevertheless "may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States." That language, he

[7] As we point out in our brief in *Monsanto* (at 17 n.9), the Fifth Circuit held (albeit somewhat tentatively) in *United States* v. *Thier*, 801 F.2d 1463, 1474 (1986), as modified, 809 F.2d 249 (1987), that an attorney's awareness of the charges against his client would not necessarily disqualify him from relief under the "bona fide purchaser" exception in Section 853(n)(6)(B). The Fifth Circuit has recently granted the government's petition for rehearing en banc in another case, *United States* v. *Jones*, 837 F.2d 1332, 1335 (5th Cir. 1988), which raises the "bona fide purchaser" issue that was addressed in *Thier*. See 844 F.2d 215 (1988).

argues (Br. 29-30), vests the court with equitable discretion to refuse to include such property in the final order of forfeiture. That is so, petitioner insists, even if the government proves all the elements necessary under Section 853(a) and (c) to require the entry of an order of forfeiture, and even if the third-party transferee is unable to qualify for relief under the bona fide purchaser exception in Section 853(n)(6)(B). Again, petitioner converts the "may" to a "must" by arguing that the court *must* exercise this supposed discretion so as to exclude from forfeiture any property that the court, when considering the restraining order, had allowed the defendant to transfer to third parties in payment of "ordinary" living expenses.

We discuss in Part B why we believe that petitioner's interpretation of the statutory scheme is incorrect. As a preliminary matter, however, we explain in Part A that petitioner is in any event foreclosed from making its new argument in this case.

A. Petitioner Is Improperly Attempting To Assert Interests Of The Defendant That The Defendant Has Abandoned

Petitioner's theory of this case turns on the question whether the district court was obligated to modify the restraining order and the final order of forfeiture to authorize Reckmeyer to pay his legal expenses out of the forfeited assets. Reckmeyer, however, did not pursue that claim on his own behalf, but instead pleaded guilty and as part of the plea agreement consented to the forfeiture of all the property identified in the indictment.

The judgment of conviction and the order of forfeiture are now final insofar as Reckmeyer is concerned. His consent to the forfeiture waived the claim in his earlier motion that the court should modify the restraining order to permit him to use some of the frozen assets to pay his attorneys. *United States* v. *Fischer*, 833 F.2d 647 (7th Cir. 1987); *United States* v. *Pemberton*, 852 F.2d 1241 (9th Cir. 1988). As in *Pemberton*, which involved a similar pretrial motion for release of funds to pay attorneys' fees, when Reckmeyer subsequently "agreed to forfeiture, he relinquished his claim for a release of assets to pay [his attorney's] fees" (*id.* at 1243); see also *United States* v. *Fischer*, 833 F.2d at 648 (the defendant "relinquished her claim by agreeing to forfeiture").[8]

Principles of finality would now bar Reckmeyer from challenging the judgment of forfeiture and the antecedent restraining order by claiming that the district court erroneously failed to exempt certain assets so that he could use them to discharge his debts to unsecured creditors, such as his attorneys. *A fortiori*, petitioner cannot seek that relief on Reckmeyer's behalf, in the face of Reckmeyer's agreement to forfeit to the United States the very assets that petitioner seeks to reach. Cf. *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105-106 (1845).

Petitioner must seek payment of the $170,513 from the United States in its own right, not by attempting to assert rights of Reckmeyer's, which even Reckmeyer could not now revive. Subsection (k) of Section 853 makes it clear that petitioner may seek that relief only under the standards and procedures established by subsection (n), the provision that sets out the rights of third parties in possession of forfeited assets.[9] Petitioner has conceded both in

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[8] See also *United States* v. *Alexander*, No. 88-1324 (Feb. 21, 1989), slip op. 12-13 (contemplating that the defendant and the government could enter into an agreement for the surrender of property that did not provide for payment of attorneys' fees out of the defendant's assets).

[9] Subsection (k) provides that, "[e]xcept as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under [Section 853] may * * * intervene in a trial or appeal

the district court (J.A. 93) and in this Court (Br. 31) that it did not qualify for relief under subsection (n) because, in light of the indictment and restraining order, petitioner could not show that it was reasonably without cause to believe that the property out of which it sought the payment of its attorneys' fees was subject to forfeiture.[10]

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of a criminal case involving the forfeiture of such property * * * or commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture." 21 U.S.C. 853(k) (Supp. IV 1986).

The legislative history indicates that subsection (k) "is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order." S. Rep. No. 225, 98th Cong., 1st Sess. 206 n.42 (1983). But that does not mean that a defendant's creditors have the same rights and remedies as the defendant; indeed, subsection (k) makes it clear that they do not, and that third parties asserting their own rights are relegated to the protections of subsection (n).

[10] There would be another obstacle to relief under subsection (n)(6)(B). Petitioner does not contend that Reckmeyer ever purported to transfer any specific items of property in the forfeited estate to it in payment of the $170,513 in attorney's fees at issue here. Petitioner therefore is merely a general creditor seeking to recover on a debt owed by Reckmeyer out of a pool of assets that was forfeited to and vested in the United States long before Reckmeyer incurred any obligation to pay petitioner the $170,513. Subsection (n)(6)(B) was not intended to afford a mechanism, in the nature of a bankruptcy procedure, by which unsecured creditors would be guaranteed a right to recover out of tainted assets that the defendant had forfeited to the United States. See *United States* v. *Campos*, 859 F.2d 1233, 1235-1238 (6th Cir. 1988); but see *United States* v. *Reckmeyer*, 836 F.2d 200, 206-208 (4th Cir. 1987); *United States* v. *Mageean*, 649 F. Supp. 820 (D. Nev. 1986), aff'd, 822 F.2d 62 (9th Cir. 1987). Insofar as the forfeited assets are concerned, the claims of third parties such as petitioner have at all times been subordinate to the paramount title of the United States since the time Reckmeyer committed the acts giving rise to forfeiture. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 672-674 &

Instead, petitioner relies on language in subsections (c) and (e), both of which address the competing rights of the defendant and the government and do not create enforceable rights in third parties. Because any rights conferred by those provisions belonged to Reckmeyer and not petitioner, and because Reckmeyer has long since abandoned any interest he may have had in enforcing those rights, petitioner is not entitled to prevail on the argument it is making in this Court, even assuming that argument would have been valid if Reckmeyer had made and pursued it.

B. A District Court Does Not Have Equitable Discretion Under Section 853 To Grant An Exemption From Forfeiture For Assets Transferred To A Third Party

Even if petitioner is in a position to invoke the theory proposed by the concurring judges in *Monsanto*, that theory should be rejected on the merits, because it rests on an erroneous reading of the drug forfeiture statute.

1. The text of Section 853 makes clear in a number of ways that forfeiture is mandatory, and not discretionary with the court. Subsection (a) of Section 853 provides that "*[a]ny* person" convicted of a violation of specified provisions of the federal drug laws "*shall* forfeit to the United States * * * (1) *any* property" constituting or derived from the proceeds of the offense and "(2) *any* of the person's property" used in the commission of the offense (emphasis added). Paragraph (3) of subsection (a) further provides that any person (such as Reckmeyer) who is convicted of engaging in a continuing criminal enterprise "*shall* forfeit, in addition to *any* property described in paragraph (1) or

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nn. 5, 6 (1981). The judgment of forfeiture in the prosecution of Reckmeyer was required only to perfect the government's title to the forfeited property. *United States* v. *Stowell*, 133 U.S. 1, 19 (1890).

(2), *any* of his interest in, claims against and property or contractual rights affording a source of control over, the continuing criminal enterprise" (emphasis added). This language is comprehensive and mandatory. Any notion that the court might nevertheless have discretion to decline to order the forfeiture of certain property included in this description is conclusively refuted by the very next sentence in subsection (a), which provides that "[t]he court, in imposing sentence on such person, *shall* order, in addition to any other sentence imposed * * *, that the person forfeit to the United States *all* property described in this subsection" (emphasis added).

In arguing that a district court has the discretion to decline to include certain property in an order of forfeiture, petitioner ignores the mandatory language of Section 853(a).[11] Petitioner instead relies on Section 853(c), which provides that any property subject to forfeiture "that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States," unless the third party establishes that he is a bona fide purchaser for value under

[11] The concurring judges in *Monsanto* acknowledged some of the mandatory language in Section (a), but sought to explain it away by stating that the language "by its terms applies only to 'any person convicted' of the referenced crimes." 852 F.2d at 1410; 88-454 Pet. App. 23a. That is no limitation at all, however, since the forfeiture sanction in Section 853 never applies unless the person has been convicted of one of the referenced crimes; thus, the occasion for a court to enter an order of forfeiture does not even arise until the defendant has been found guilty of such an offense. Moreover, that explanation fails to account for the sentence in Section 853(a) that provides that the court, in imposing sentence on a defendant convicted of the referenced crimes, "shall order * * * that the person forfeit to the United States all property described in this subsection."

the provisions of Section 853(n). Petitioner relies on Section 853(c) even though petitioner has never been in possession of most of the $170,513 that Reckmeyer owes petitioner, and even though Section 853(c) by its terms grants rights only to "transferee[s]," *i.e.*, persons in the possession of the claimed assets.

Petitioner asserts (Br. 29) that the phrase "may be the subject of an order of forfeiture" in Section 853(c) vests the court with discretion to decline to forfeit assets that have been transferred to a third party. That discretion exists, petitioner argues, even if the defendant is convicted of a covered offense and even if it is established, by proof or by admission (as in this case), that the property satisfies the prerequisites for mandatory forfeiture under Section 853(a). Petitioner further argues (Br. 30) that the court *must* exercise this supposed "discretion" by declining to order the forfeiture of any property that it previously excluded from the scope of a pretrial restraining order—*i.e.*, that such property "must be immunized from forfeiture upon conviction" (Br. 28). Putting to one side the conceptual difficulties with petitioner's argument in favor of a "discretion" that the court may exercise in only one way, it is clear that subsection (c) was not intended to vest the district court with any such discretion in the first place.

Rather than authorizing district courts to grant dispensation from forfeiture on a discretionary basis, subsection (c) makes it clear that third parties have only narrow and well-defined rights with respect to tainted property in their possession. Subsection (c) first establishes that the government's interest in forfeitable property vests at the time the defendant committed the acts giving rise to the forfeiture. The subsection then sets forth the only circumstance in which a court may afford relief to a third party who has acquired the tainted property after the defendant commit-

ted the crime: the transferee must establish at a hearing pursuant to subsection (n) that "he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under [Section 853]." The narrow grounds for judicial relief set forth in subsection (c) strongly indicate that Congress intended to require the all-encompassing and mandatory provisions of subsection (a) to apply in all other situations in which tainted property is transferred to third parties.

The use of the word "may" in subsection (c), upon which petitioner seizes, does not alter that regime. That word is used in a sentence authorizing the inclusion, in a special verdict of forfeiture, of property that was transferred to a third party after the property became forfeitable because of the criminal conduct of the defendant. Significantly, the next clause of subsection (c) provides that the court "shall" order the forfeiture of any transferred property that is covered by the special verdict. The language on which petitioner relies is therefore simply language of authorization for the jury.[12] Particularly in light of the mandatory directive to order the forfeiture of any property covered by the special verdict, the use of the word "may" does not suggest the existence of a discretionary authority in the court to dispense with forfeiture.

Petitioner's contrary argument appears to rest in part on the incorrect premise that the court enters the special verdict of forfeiture, just as it enters an order of forfeiture. See, *e.g.*, Br. 30 n.16. It is the jury, not the court, that

[12] To the extent that the use of the word "may" in subsection (c) connotes the exercise of a range of choice, the choice is that of the jury in deciding whether the requisite facts are present to return a special verdict of forfeiture and trigger the court's mandatory obligation to enter an order of forfeiture on the verdict.

returns a special verdict of forfeiture under Section 853. See Fed. R. Crim. P. 31(e);[13] *United States* v. *Feldman*, 853 F.2d 648, 660 (9th Cir. 1988); *United States* v. *Sandini*, 816 F.2d 869, 874 (3d Cir. 1987); *United States* v. *Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). Compare Fed. R. Crim. P. 23(c) (in a case tried without a jury, the judge makes "findings"). The court then enters its judgment on the basis of the jury's verdict (Fed. R. Crim. P. 32(b)(*i*)), and if the verdict "contains a finding of property subject to a criminal forfeiture," the judgment "shall" authorize the Attorney General to seize the interest in property subject to forfeiture (Fed. R. Crim. P. 32(b)(2)). See S. Rep. No. 225, *supra*, at 193-194.

Elsewhere in Section 853 Congress specifically addressed the matter of granting discretionary or equitable relief in order to ameliorate the application of the forfeiture sanction in appropriate circumstances. Subsection (i)(1) provides that the Attorney General is authorized to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section * * *." Congress thus chose to vest the dispensing power not in the courts, but in the Executive Branch, where it traditionally has resided under the forfeiture statutes. See, *e.g.*, *United States* v. *von Neumann*, 474 U.S. 242 (1986). In light of this express statutory provision

[13] Rule 31(e) provides that if the indictment alleges that an interest or property is subject to criminal forfeiture, "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." This rule does not suggest that the court may defeat forfeiture by declining to submit the issue to the jury.

for the granting of discretionary relief by the Attorney General, and the close relationship between that authority and the President's constitutional "Power to grant Reprieves and Pardons for Offences against the United States" (Art. II, § 2), there is no reason to believe that Congress also intended, sub silentio, to authorize the courts to exercise a virtually identical authority.

This conclusion is strongly reinforced by the portion of subsection (c) that announces that the government's ownership interest in forfeitable property vests at the time of the commission of the crime. It would be extraordinary for Congress, which alone has the power "to dispose of * * * Property belonging to the United States" (Art. IV, § 3, Cl. 1), to confer on a district court the discretion effectively to give away property that belongs to the United States by declining to enter an order of forfeiture and instead allowing a third-party transferee to retain the property. The Court should not read such a remarkable result into Section 853 in the absence of a clear expression of congressional intent to do so.

Petitioner asserts (Br. 29-30) that the legislative history of subsection (c) shows that "it vests the district court with equitable discretion in imposing a forfeiture," but petitioner cites nothing from the legislative history to support that assertion. In fact, the legislative history unambiguously shows that Congress did not intend to vest the courts with any discretion on the question of forfeiture. The Senate Report states with respect to the identical language in the RICO forfeiture provision (S. Rep. No. 225, *supra*, at 200):

> [T]he final sentence in section 1963(a) emphasizes the mandatory nature of criminal forfeiture, requiring the court to order forfeiture in addition to any other penalty imposed. This is in accord with case law holding the forfeiture provision of the present forfeiture statute to be mandatory on the trial court.

The leading case for that proposition, cited by the Report (*id.* at 200 n.25), was *United States* v. *L'Hoste*, 609 F.2d 796, 809-813 (5th Cir.), cert. denied, 449 U.S. 833 (1980). There, the Fifth Circuit granted the government's petition for a writ of mandamus requiring the district court to order forfeiture of a defendant's interest in a racketeering enterprise. The *L'Hoste* court reasoned that (1) although the RICO statute used discretionary language to describe the imposition of a fine or imprisonment, it used the mandatory "shall" in reference to forfeiture (609 F.2d at 810); (2) the only discretion conferred on the court "relates to collateral measures dealing with the preservation of the property subject to forfeiture rather than the forfeiture itself" (*id.* at 811); and (3) "[t]he Attorney General, rather than the court, would appear to have the power and discretion involving the remission and mitigation of forfeiture" (*id.* at 812).[14]

The reasons stated in *L'Hoste* for refusing to recognize discretion in the district court apply with even greater force to the even more explicit statutory language enacted by Congress in the Comprehensive Forfeiture Act of 1984. In any event, Congress's express approval of the decision in *L'Hoste* requires that Section 853 be read in the same way. See S. Rep. No. 225, *supra*, at 211. Consistent with this clear congressional intent, other courts of appeals have consistently held that forfeiture is mandatory. See

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[14] In the other decision cited in the Senate Report (at 200 n.25), the Ninth Circuit reversed a district court order declining to order forfeiture of property because the defendant's wife had recently given birth to a child and the family would need some source of support. *United States* v. *Godoy*, 678 F.2d 84, 87-88 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983). The Ninth Circuit found the reasoning of *L'Hoste* compelling and adopted that court's holding that "the forfeiture provisions of § 1963(a) are mandatory, leaving no discretion in the district court" (*id.* at 88).

United States v. *Perholtz*, 842 F.2d 343, 369 (D.C. Cir. 1988); *United States* v. *Busher*, 817 F.2d 1409, 1414 (9th Cir. 1987); *United States* v. *Kravitz*, 738 F.2d 102, 104-106 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); *United States* v. *Hess*, 691 F.2d 188, 190 (4th Cir. 1982).

The reasons for this mandatory rule are not diminished when the property has been transferred to a third party. To the contrary, as the Senate Report explains, the procedure established by subsection (c) in those circumstances "provides for more orderly consideration both of the forfeiture issue and the legitimacy of third party claims" (S. Rep. No. 225, *supra*, at 201). "Moreover, even if a transfer is sustained at the ancillary hearing [under subsection (n)], the fact that the jury will have determined that the property would have been forfeitable if it had remained in the hands of the defendant will allow the court to order the forfeiture of substitute assets of the defendant [under subsection (p)(2)], to assure that the defendant does not retain the gain from this pre-conviction transfer" (*ibid.*).

2. Petitioner attempts to avoid the statutory mandate that an order forfeiting all tainted property to the United States be included in the court's *final* judgment by invoking the asserted discretion of the district court in deciding whether to issue or modify a *pretrial* restraining order under subsection (e)(1)(A). Specifically, petitioner argues (Pet. Br. 12-18) that the language in subsection (e)(1)(A) stating that a court "may" issue a restraining order after the indictment has been returned gives the court discretion to exclude some assets from the scope of such an order. Indeed, in petitioner's view (Pet. Br. 19-28), the district court *must* exercise that discretion to exclude from a pretrial restraining order any assets that the defendant wishes to use to pay "ordinary" living expenses, in which petitioner includes the $170,513 in legal fees that Reckmeyer incurred over the course of only several months. On these premises, petitioner reasons that the court must have the discretion to exclude those assets from the final judgment of forfeiture as well, because any other construction " 'would essentially nullify the district court's equitable authority to permit defendants to make ordinary lawful expenditures under Section 853(e)(1).' " Pet. Br. 30, quoting *Monsanto*, 852 F.2d at 1410 (Winter, J., concurring) (88-454 Pet. App. 22a). This argument stands the statutory scheme on its head by rendering the trial and entry of final judgment merely ancillary to and in aid of action taken by the court at a preliminary stage of the case.

a. Petitioner's argument that a court can effectively grant a permanent exemption from forfeiture when it decides whether to issue a temporary restraining order is refuted by the text of subsection (e)(1)(A), which authorizes a court to issue a restraining order only to "preserve the availability of property described in subsection (a) * * * for forfeiture * * * in the event of conviction." See also S. Rep. No. 225, *supra*, at 204 ("The sole purpose of the bill's restraining order provision * * * is to preserve the status quo, *i.e.*, to assure the availability of the property pending disposition of the criminal case."). It would be inconsistent with the limited purpose contemplated for restraining orders under the statute to permit the denial of a restraining order to have the effect of conclusively exempting any assets not covered by a restraining order from forfeiture in the event that the defendant is convicted. As this Court has observed, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are

less formal and evidence that is less complete than in a trial on the merits * * *. In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *University of Texas* v. *Camenisch,* 451 U.S. 390, 395 (1981) (citations omitted).[15]

Thus, a defendant who is not under a restraining order would not violate any court order if he subsequently disposed of whatever interest he might have in the property, but both the defendant and his transferee would assume the risk in such a transaction that the defendant might ultimately be convicted and that the jury might return a special verdict of forfeiture. In spite of the denial of a restraining order, the verdict of forfeiture would require the court to order the property forfeited to the United States unless the transferee established under subsection (n) that he was a bona fide purchaser for value without reason to believe that the property was subject to forfeiture. In other words, both the defendant and the transferee would assume the risk that the United States' claim of superior title to the property, as set forth in the

[15] Petitioner's reliance on subsection (e)(1)(A) as the basis for its notion that the district court may exempt property from a final judgment of forfeiture also gives rise to anomalies. The district court's authority under subsection (e)(1)(A) may be exercised only "[u]pon application of the United States * * *." Thus, even under petitioner's theory, if the United States does not apply for a pretrial restraining order, there is no mechanism by which the court can release or exclude property from pretrial restraint as a predicate for exempting it from a final judgment of forfeiture. For this reason, petitioner's construction of subsection (e)(1)(A) could deter the United States from seeking injunctive relief for fear that the district court would seize the opportunity not only to deny preliminary relief, but also to immunize assets from forfeiture altogether. This deterrent effect would further undermine Congress's purpose to strengthen the restraining-order provisions in 1984.

indictment, might ultimately prevail, and that the defendant might thereby be shown to have had no interest in the property that he could convey to the transferee.

The purposes of that rule apply with special force in this context, where the property transferred to a third party allegedly constitutes the illicit proceeds or instruments of narcotics trafficking and is the subject of a criminal prosecution as a result. Nor is there any basis for a special exception to that rule for situations in which it is an attorney who accepts the assets from the defendant with knowledge or cause to believe that they are tainted by illegality and that all right to the assets therefore has already vested in the United States. To the contrary, an attorney can be expected to be especially familiar with the legal principles that prevent a third party from acquiring good title in such circumstances and to comprehend the significance of the notice of illegality and forfeiture furnished by the charges in the indictment. In addition, there is an important public interest in assuring public confidence in the integrity of the defense bar and the criminal justice system that particularly warrants a rule barring attorneys from receiving the illicit proceeds and instruments of drug trafficking in payment of their fees.

b. To be sure, a court considering a request for a restraining order does enjoys some measure of equitable discretion as to whether to enter such an order and what provisions the order should contain. Thus, in proper circumstances, a court might deny the government's request for injunctive relief altogether, or it might restrain less than all of the defendant's property—perhaps because the government had not sufficiently shown that such relief was required to preserve the property for forfeiture. But in that event, the court would simply have declined to employ judicial sanctions to maintain the status quo pendente lite.

An exercise of discretion of that sort has nothing to do with the duty that petitioner would impose on the court to exempt "living expenses" from the restraining order and the concomitant duty to exempt from the final order of forfeiture any such "living expenses," including attorneys' fees, that were excluded from the reach of the restraining order. That exercise of "discretion" has no basis in equity practice, and it is contrary to the language and purposes of Section 853(e)(1).

The key premise underlying petitioner's argument that the court must exercise its discretion in favor of exempting "living expenses" from any restraining order is that the balance of hardship favors the defendant, not the government. We doubt that it imposes an unreasonable hardship on a defendant to prohibit him from enjoying the economic benefits of his criminal activities, once a grand jury has found probable cause to believe that the identified property is forfeitable. But in any event, Section 853(e)(1) clearly contemplates that the task of balancing the hardship to the individual against the need to preserve the property that is subject to forfeiture is no longer appropriate once the indictment has been returned.

Subsection (e)(1)(B), which governs requests for preindictment restraining orders, provides that the court may issue a restraining order only if it finds that there is a substantial probability that the United States will prevail on the issue of forfeiture, that failure to enter the order will result in the property's being unavailable for forfeiture, and that "the need to preserve the availability of the property through entry of the requested order outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. 853(e)(1)(B)(ii) (Supp. IV 1986). By contrast, subsection (e)(1)(A), which governs requests for postindictment restraining orders, does not

provide for the court to balance the need to preserve the property against the hardship to the defendant; it authorizes the court to issue a restraining order based solely on the need to preserve the property. This difference in the statutory text is sufficient in itself to establish that Congress did not intend the possible hardship to the defendant to play much (if any) role in shaping the restraining order after indictment – much less that Congress intended the courts routinely to permit defendants to invade the property subject to forfeiture, as petitioner urges. Cf. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

The legislative history confirms this interpretation. The Senate Report states that "the probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order" (S. Rep. No. 98-225, *supra,* at 202). And after describing the balance-of-hardship test applicable to preindictment restraining orders, the Report states: "It is stressed, however, that this stringent standard applies only in this context; it is not to be extended to restraining orders sought after indictment" (*id.* at 203).

c. Finally, petitioner is wrong in contending (Br. 24-27) that the interests underlying the forfeiture sanction would not be undermined by allowing the defendant to invade forfeitable assets to pay his living expenses and attorneys' fees. Because Section 853(a) requires the forfeiture of "any" and "all" property that constitutes the proceeds of or afforded the defendant with a source of control over the continuing criminal enterprise, and because the express purpose of subsection (e)(1)(A) is to "preserve" the availability of property for forfeiture in the event the defendant is convicted, it is "beyond dispute that *any* transfer to a third party of property otherwise subject to a restraining order frustrates, to the precise extent of the

property transferred, the expressly stated statutory purpose." *Monsanto,* 852 F.2d at 1411 (Mahoney, J., dissenting) (88-454 Pet. App. 30a).[16]

In sum, the statute that petitioner describes in its brief is simply not the statute that Congress passed. Section 853 does not grant district courts the discretion to relieve defendants of forfeitures; it does not require district courts to exclude "ordinary living expenses" from the reach of post-indictment restraining orders; and it does not require the court to exclude from a final judgment of forfeiture any property that was excluded from the coverage of a restraining order entered earlier in the litigation.

II. THE CONSTITUTION DOES NOT REQUIRE CONGRESS TO FASHION A SPECIAL EXCEPTION TO THE UNIFORM RULE OF MANDATORY FORFEITURE FOR THOSE TAINTED ASSETS THAT THE DEFENDANT WANTS TO USE TO PAY AN ATTORNEY

Petitioner contends (Br. 33-46) that Section 853 is unconstitutional to the extent that it does not permit a court to exempt from forfeiture assets that the defendant wants to use to pay defense counsel. "Judging the constitutionality of an Act of Congress is properly considered " 'the gravest and most delicate duty that this Court is called upon to perform,' " and the "duly enacted and

[16] Contrary to petitioner's contention (Br. 24), the purpose of subsections (a) and (e)(1) in this regard is not only to ensure that the defendant does not benefit from the tainted assets, but also to furnish an important source of revenue for the Department of Justice Assets Forfeiture Fund, which was also established by the 1984 Act. See 28 U.S.C. 524(c) (Supp. IV 1986), as amended by the Asset Forfeiture Amendments Act of 1988 (Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6071-6080 102 Stat 4320-4327). That Fund is used to defray the costs of and furnish an incentive for forfeiture actions, as well as to support various law enforcement activities. See S. Rep. No. 225, *supra,* at 197, 198, 216-217; H.R. Rep. No. 845 (Pt. 1), 98th Cong., 2 Sess. 7, 13, 23-25 (1984).

carefully considered decision of a co-equal and representative branch of our Government" is entitled to substantial deference. *Walters* v. *National Ass'n of Radiation Survivors,* 473 U.S. 305, 319 (1985), quoting *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981), and *Blodgett* v. *Holden,* 275 U.S. 142, 148 (1927) (Holmes, J.). That is especially so in this case, where Congress enacted the statutory provisions in an effort to address the grave national problem of narcotics trafficking by enacting a measure that is designed to strip all profits from those who engage in that trade and to remove the tainted proceeds and other property associated with it from the channels of commerce.

Contrary to petitioner's contention, neither the Fifth Amendment nor the Sixth Amendment requires Congress to fashion a special exception to the uniform and mandatory forfeiture sanction under Section 853 in order to permit Reckmeyer and other defendants to use the illicit proceeds and instruments of their narcotics trafficking to pay legal fees. Nor does either Amendment require Congress to allow an attorney to receive such assets in payment of his fees, where the attorney knew or had reason to know that the assets were illegally derived and that title to the assets therefore was already vested in the United States.

A. Section 853 Does Not Impermissibly Interfere With The Defendant's Sixth Amendment Right To The Assistance Of Counsel

1. Petitioner argues (Br. 34-42) that applying Section 853 to assets that the defendant would like to use to pay an attorney violates the Sixth Amendment right to the assistance of counsel. Petitioner does not dispute the conclusion by the en banc court below that Section 853, in its general operation, "poses no threat whatsoever to the ab-

solute right to be represented by counsel" (Pet. App. 8a). That right is the core guarantee of the Sixth Amendment (see *United States* v. *Cronic*, 466 U.S. 648, 653 (1984)), and it "has come to mean that a criminal defendant has the absolute right to representation *either* by retained counsel or by appointed counsel in a proceeding that threatens imprisonment" (Pet. App. 9a (emphasis in original)). See *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). If a pretrial restraining order or the possibility of postconviction forfeiture of assets should render a particular defendant financially unable to retain private counsel, his absolute right to representation will be protected by the appointment of counsel under the Criminal Justice Act, 18 U.S.C. 3006A. See Pet. App. 9a; *Nichols*, 841 F.2d at 1506. If the appointed counsel fails to provide reasonably competent assistance and the defendant is thereby prejudiced, the deprivation of constitutionally effective representation will be remedied by the order of a new trial. *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Perry* v. *Leeke*, 109 S. Ct. 594, 599-600 (1989); see also *Moya-Gomez*, 860 F.2d at 725. Thus, nothing in Section 853 has any effect on the core component of the Sixth Amendment guarantee.

Petitioner's objection is that the authority of a court to restrain the disposition of all allegedly tainted assets, including those that the defendant might want to use pay a lawyer, will render the defendant unable "to pay or assure payment to a lawyer" (Br. 39) and thereby create a "risk of non-payment" of fees (Br. 35). That risk may in turn prompt a private attorney to decline to accept the case. Even in the absence of a restraining order, petitioner contends (Br. 34, 35, 40) that the mere possibility that any assets identified in the indictment that are transferred to an

attorney might be forfeited to the United States would be sufficient to deter a private attorney because of the uncertainty over whether he would receive his fee. In petitioner's view, this effect of Section 853 impermissibly interferes with the defendant's qualified right under the Sixth Amendment "to select and be represented by one's preferred attorney." *Wheat* v. *United States*, 108 S.Ct. 1692, 1697 (1988).

An an initial matter, we fail to see how petitioner can claim that there was any such violation in this case, since Reckmeyer in fact was represented by counsel of his choice in the prosecution. See *United States* v. *Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984). Petitioner presumably has a contract claim against Reckmeyer for $170,513 in unpaid legal fees for that representation, but petitioner's failure to recover on that claim out of assets that Reckmeyer voluntarily forfeited to the United States does not violate *Reckmeyer's* Sixth Amendment rights. Compare *Nichols*, 841 F.2d at 1497-1498.[17] On the assumption that the counsel-of-choice issue is properly presented in this case, however, we shall now show that the en banc court below

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[17] Although Reckmeyer claimed in his March 7, 1985, motion to modify the restraining order that sufficient assets should be released to him so that he could use them to pay petitioner, Reckmeyer relinquished that claim when he pleaded guilty and agreed to forfeit to the United States all of the property identified in the indictment, including any that he might have used to pay attorneys' fees. The en banc court of appeals nevertheless held that petitioner has standing to invoke Reckmeyer's Sixth Amendment rights in seeking the release of a portion of that property from the final judgment of forfeiture to pay its fees (Pet. App. 7a-8a). Although in some circumstances it might be appropriate for counsel to assert the Sixth Amendment rights of his client in the fee context, counsel should not be permitted to do so in a case such as this one, where the client has relinquished his opportunity to advance the same claim. Compare *Hodel* v. *Irving*, 481 U.S. 704, 711-712 (1987).

was correct in "declin[ing] to expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets" (Pet. App. 15a).

2. In *Wheat*, the Court sought to place the defendant's interest in being represented by a particular lawyer in its proper constitutional context. The Court first stressed that "the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial,' " 108 S.Ct. at 1696-1697, quoting *Strickland* v. *Washington*, 466 U.S. at 689, and "that in evaluating Sixth Amendment claims, 'the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such,' " *id.* at 1607, quoting *United States* v. *Cronic*, 466 U.S. 461, 657 n.21 (1984). See also *Morris* v. *Slappy*, 461 U.S. 1, 13-14 (1983) (Sixth Amendment does not guarantee "a meaningful attorney-client relationship"). For that reason, the Court held in *Wheat* that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." 108 S. Ct. at 1697. Similarly, in *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Court stated only that "a defendant should be afforded a fair opportunity to secure counsel of [the defendant's] own choice," *id.* at 53, not that a defendant has an absolute right to do so, and that a court would violate "due process in the constitutional sense" if it "were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him," *id.* at 69 (emphasis added).[18]

[18] Accord *Crooker* v. *California*, 357 U.S. 433, 439 (1958); see also *Chandler* v. *Fretag*, 348 U.S. 1, 10 (1954) ("a defendant must be given a reasonable opportunity to employ and consult with counsel").

Consistent with these principles, the Court made clear in *Wheat* that "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." 108 S. Ct. at 1697. In fact, the Court has recognized in a number of settings that a court may take appropriate measures in aid of the judicial process in criminal cases even though those steps may have the direct consequence of preventing the defendant from being represented by his preferred counsel. For example, in *Wheat* itself the Court sustained an order disqualifying the defendant's lawyer, and the Court has held that a defendant has no right to be represented by an attorney whose schedule cannot be adjusted to the requirements of the court's docket, *Morris* v. *Slappy*, 461 U.S. at 11-12, or by a person who is not a member of the bar, *Leis* v. *Flynt*, 439 U.S. 438 (1979).[19] In these situations, the defendant's inability to retain the counsel of his choice is the incidental consequence of the invocation of rules or principles of general applicability (rules of professional ethics, the requirements of orderly judicial administration, and bar membership) that serve important public purposes. Because the defendant's loss of the counsel of his choice is the result of policies that promote general public interests and is not the product of an effort to disrupt the defendant's relationship with any

[19] See also Pet. App. 13a; *Ford* v. *Israel*, 701 F.2d 689, 692-693 (7th Cir. 1983).

The conclusion that the Sixth Amendment permits reasonable regulation of the bar, and therefore of a party's right to select a particular member of the bar to represent him, is strongly supported by Section 32 of Judiciary Act of 1789, § 35, 1 Stat. 92. Section 35, which is now codified at 28 U.S.C. 1654, provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." Compare *Faretta* v. *California*, 422 U.S. 806, 831 (1975).

particular lawyer, these cases do not result in an "arbitrary" interference with the representation of the defendant by his preferred counsel. In such cases, the defendant has been afforded a "fair opportunity" to secure counsel of his own choice within the framework of those general rules.

Quite aside from the restrictions that may properly be imposed by the government itself on the defendant's right to select a particular lawyer to represent him, various legal or practical circumstances confronting the particular defendant or his preferred lawyer at the time the criminal charges are brought may render it impossible for that lawyer (or even any private attorney) to represent the defendant. Of special relevance to this case, the Court emphasized in *Wheat* that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant" (*ibid.*). For example, as the court below pointed out, counsel may decline to take the case because of uncertainty about whether the defendant will be able to pay his fee. See Pet. App. 13a. It is, of course, axiomatic that a defendant's ability to be represented by counsel of his choice is, as a practical matter, limited by the fee the defendant can afford to pay. *Morris* v. *Slappy*, 461 U.S. at 23 & n.5 (Brennan, J., concurring).

3. In light of these principles, Section 853 does not impermissibly interfere with a defendant's right to have a fair opportunity to select and be represented by his preferred attorney.

Petitioner argues that the Sixth Amendment requires that any assets identified in the indictment as subject to forfeiture must be exempted from a final judgment of forfeiture if the defendant wants to use them to pay his lawyer.[20] In effect, petitioner argues that a defendant's in-

[20] Fed. R. Crim. P. 7(c)(2) requires the indictment to specify any property that will be subject to criminal forfeiture.

vocation of his Sixth Amendment right to the assistance of counsel requires the court to dismiss a portion of the underlying indictment. The effect of this principle would be to read into the Sixth Amendment, which was intended to embody the *procedures* that are required in a criminal prosecution (see *Faretta*, 422 U.S. at 818), a *substantive* defense to the charges on which that prosecution is based. Under petitioner's theory, insofar as the forfeiture charges in the indictment are concerned, the assistance of counsel rendered to the defendant would not be "*for* his defence," as the Sixth Amendment provides; it would *be* "his defence." There is no reason to believe that the Framers of the Sixth Amendment intended it to confer on the defendant an immunity to liability for primary conduct occurring outside the context of the criminal prosecution. Cf. *Thomas* v. *Arn*, 474 U.S. 140, 146-147 & n.5 (1985).

Moreover, subsection (a) of Section 853 does not provide for the forfeiture of "attorneys' fees" as such. It provides for the forfeiture of certain of the *defendant's* property—in this case, all property that represented the illicit proceeds of Reckmeyer's narcotics trafficking or that afforded him a source of control over the continuing criminal enterprise. The statute mandates forfeiture based on the origins of the property, not the purposes to which the defendant wishes to devote it, and it does so to further compelling public purposes of general applicability that are unrelated to the attorney-client relationship as such. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). As a result, Section 853 does not arbitrarily single out attorneys or their fees for adverse treatment: the defendant is equally barred from spending assets identified in the indictment to purchase a house, a vacation, an automobile, groceries, or the assistance of an accountant. See *Nichols*, 841 F.2d at 1504-1505. Thus, petitioner is wrong in asserting (Br. 38) that the government here "seeks to deprive a

defendant of the ability to retain private counsel of any kind."

Nor do the forfeiture provisions impose an affirmative governmental bar to representation by an attorney the defendant has selected to represent him; any inability of the defendant to receive the services of a particular attorney results from the attorney's private decision to refuse to accept the employment in light of the uncertainty occasioned by the defendant's financial and other circumstances—circumstances that in turn are attributable to the defendant's alleged commission of acts that automatically give rise to forfeiture. The operation of Section 853 therefore is quite unlike the disqualification order in *Wheat*, which constituted a *direct* governmental prohibition against the defendant's selection of a particular lawyer to represent him, but which nevertheless was sustained by this Court. It also is quite unlike the situation described in *Powell* v. *Alabama*, where the Court stated that a court would violate due process if it were arbitrarily to "refuse" to hear a party by the counsel he had retained. Rather, this case falls squarely within the scope of the Court's recognition in *Wheat* that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." 108 S.Ct. at 1697.[21]

[21] In addition to arguing that attorneys will be deterred from accepting a case involving forfeiture counts because of uncertainties about collecting their fees, petitioner also contends (Br. 35-37) that attorneys who did accept such cases would face ethical dilemmas. See also ABA Br. 17-22. As the court below concluded, any such claims should be considered in the context of an individual case; the possibility that they might arise in some hypothetical case is no justification for holding an Act of Congress unconstitutional. Pet. App. 18a-19a. In any event, the ethical concerns petitioner raises are speculative.

Petitioner suggests (Br. 36), for example, that a defendant would be disserved if the lawyer sought to remain ignorant of relevant facts in order to preserve his ability to show in a postconviction hearing under subsection (n) that he was reasonably without cause to believe that the property was subject to forfeiture. Petitioner, however, has elsewhere conceded (see Br. 31, 34) that virtually no defense counsel in a criminal prosecution could satisfy that standard because the indictment would provide ample notice that the assets are subject to forfeiture. This supposed conflict therefore is remote. Petitioner also suggests (Br. 36) that a lawyer might have a conflict of interest if an occasion arose for the defendant to enter into a guilty plea that required him to forfeit substantial assets. No such claim of ineffective assistance of counsel could be raised in this case, however, because Reckmeyer pleaded guilty under just such an agreement. Moreover, as the court below observed (Pet. App. 18a-19a), this Court rejected a similar contention in *Evans* v. *Jeff D.*, 475 U.S. 717, 727-729 (1986), that allowing waivers of fees would lead lawyers to violate their ethical duties to their clients.

Finally, petitioner contends (Br. 36-37) that the operation of the forfeiture sanction "closely resemble[s]" a contingent fee, which is ordinarily barred in a criminal cases. ABA Model Rule 1.5(d)(2); ABA Model Code DR 2-106(C). But petitioner does not contend that the fees it charged Reckmeyer at hourly rates actually were contingent upon the outcome. Moreover, the fact that the lawyer's ability to collect his fee might be affected by the outcome of the case does not mean that the fee itself is contingent. There presumably are many instances in which the prospects of recovering a fee in a criminal case are greatly diminished as a practical matter by a conviction, since the defendant might be unable to work and be financially ruined. In addition, the prohibition against contingent fees rests in large part on the public interest in avoiding any temptation to corrupt the legal system (see ABA Model Standards for Criminal Justice: The Defense Function, Standard 4.33(a), at p. 4-37), rather than protecting the interests of the defendant. In any event, a contingent fee does not necessarily raise constitutional concerns, and Congress reasonably could conclude that the integrity of the criminal justice system would be better served by tolerating an arrangement that might "resemble" a contingent fee, than by allowing attorneys to accept drug money in payment of their fees.

It also is significant that the statutory provisions that are said to render a defendant unable to afford an attorney

or to lead an attorney to decline to accept his case embody well-established principles of property law in general and forfeiture law in particular. When Congress enacted Section 853(c) in 1984, it expressly incorporated into that provision what it called the "taint" theory of this Court's decision almost 100 years ago in *Stowell* v. *United States,* 113 U.S. 1, 19 (1890). See 88-454 U.S. Br. 26-27. The indictment gives the attorney (and any other third party with reason to know of it) ample notice of the government's superior title. There is no arbitrariness or novelty in a rule that the defendant cannot give (and a third party with notice cannot receive) good title if the property identified in the indictment is ultimately found to belong to someone else. See *Utah* v. *United States,* 284 U.S. 534, 542-543 (1932); Uniform Commercial Code § 2-403; 3 Anderson, *Uniform Commercial Code* § 2-403:17 (1983); Tiffany, *The Law of Real Property,* §§ 1294, 1328 (1939).

The indictment in this case not only put petitioner on notice that the assets in question belonged to the United States rather than Reckmeyer; it also formally charged that those assets were the illicit proceeds of Reckmeyer's drug activities or were otherwise unlawfully associated with those activities. The Constitution requires only that a court afford a defendant a "fair opportunity to secure counsel of [his] choice" (*Powell* v. *Alabama,* 287 U.S. at 53), using whatever assets he has at his lawful disposal. A defendant is not denied that "fair opportunity" if he is prevented as a practical matter from spending assets that there is probable cause to believe are illegal and no longer his own. See *Walters* v. *National Ass'n of Radiation Survivors,* 473 U.S. at 370 (Stevens, J., dissenting) (in a criminal case, the Sixth Amendment protects "the individual's right to spend his own money to obtain the advice and assistance of independent counsel"). The absence of any such unfairness is now especially evident in this

case, since Reckmeyer agreed as part of his guilty plea that the property did consist of the proceeds of his drug activities or afforded him a source of control over the continuing criminal enterprise.

If Reckmeyer had robbed a bank and had been found with $170,000 of the proceeds in his possession, he plainly would not have had a Sixth Amendment right to spend the $170,000 to hire an attorney. Indeed, the respondent in *Monsanto* concedes (88-454 Resp. Br. 37) that the government would have a "compelling" interest in securing the return of that money and preventing the robber from using it for any purpose, even to hire an attorney. The result should be no different where, as here, the assets are the illicit proceeds or instruments of drug trafficking. Pet. App. 13a-14a. Indeed, if Reckmeyer had been found in the possession of $170,000 worth of drugs or narcotics manufacturing equipment, it could not seriously be maintained that he would have had a Sixth Amendment right to have the government sell the drugs or the equipment and give the proceeds to him so that he could pay an attorney for legal services. Neither Reckmeyer nor petitioner obtained any constitutional rights by virtue of Reckmeyer's conversion of the contraband into cash and other property.

Finally, there are substantial reasons of public policy underlying the forfeiture provisions that militate against the novel expansion of the qualified right to counsel of choice that petitioner urges. "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of the undeserved power may be the ability to command high-priced legal talent" (Pet. App. 21a). Furthermore, the public has a compelling interest in deterrence, and a "drug kingpin's certain knowledge that he may have at his beck and call lawyers whose fees run into hundreds of thousands of dollars may make him less

apprehensive about continuing in his business" (*ibid.*). Accord *Nichols,* 841 F.2d at 1505. "Public confidence in the administration of justice might be a casualty of exempting attorney's fees from forfeiture," because "[p]ublic cynicism and distrust of the legal system might grow as citizens watched huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege" (Pet. App. 21a-22a).

B. The Due Process Clause Of The Fifth Amendment Does Not Require An Exception To Section 853

Petitioner finally contends (Br. 43-45) that the forfeiture of assets that the defendant wants to use to pay attorneys' fees violates the Due Process Clause because it gives the government the power to decide, for tactical reasons, whether a defendant will be represented by a particular counsel of his choice, and thereby upsets the " 'balance of the forces between the accused and his accuser,' " (Br. 43, quoting *Wardius* v. *Oregon,* 412 U.S. 470, 474 (1973). The en banc court below correctly answered this contention (Pet. App. 19a):

> [T]he possibility that a prosecutor might abuse the forfeiture statutes in a particular case does not justify holding all fee forfeiture unconstitutional. Courts have ample tools for dealing with situations where prosecutorial misconduct threatens the fairness of a trial. Due process claims of this type must, however, be dealt with on specific facts. Every criminal law carries with it the potential for abuse, but a potential for abuse does not require a finding of invalidity.

See also *Nichols,* 841 F.2d at 1508. That is the same approach this Court took last Term in *Wheat* in response to

the contention that the government might seek to "manufacture" a conflict of interest in order to prevent a defendant from retaining a particularly able defense counsel: the Court noted that the trial courts are undoubtedly aware of this possibility, and it cautioned them to take it into account, along with other factors, in ruling on disqualification motions. 108 S. Ct. at 1699.

Petitioner does not suggest that there was any abuse in this case, such as adding forfeiture allegations for the purpose of causing petitioner to withdraw or otherwise seeking an unfair advantage over Reckmeyer. In light of the scale of Reckmeyer's operation and the amount of property he conceded was forfeited to the United States, no such claim could plausibly be made.

Nor has petitioner pointed to any such abuse in any other case. Undocumented speculation that a prosecutor might abuse his authority in another case furnishes no basis for holding an Act of Congress unconstitutional across the board in its application to cases in which the defendant seeks to use forfeitable assets to pay attorneys' fees. *United States* v. *Salerno,* 481 U.S. 739, 745, 752 (1987).

Unlike *Wardius,* this case does not involve the validity of a procedural rule affecting discovery in a criminal prosecution; petitioner asks this Court to immunize certain defendants from a critical aspect of their substantive liability for the underlying criminal offense. The court should be especially reluctant to invalidate an Act of Congress that imposes a sanction for primary conduct away from the courtroom simply because the sanction has some incidental effect on the conduct of litigation. Congress has adopted a broad forfeiture remedy because it considers that remedy to be essential to achieve the purposes of the narcotics laws. And, as we have shown, the forfeiture remedy does not offend any particular constitutional pro-

vision designed to protect a criminal defendant from government oppression, such as the Sixth Amendment right to the assistance of counsel. In those circumstances, applying the forfeiture statute according to its terms does not violate the general constitutional guarantee to due process.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the United States Constitution provides:

> No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

Section 853 of Title 21, United States Code (Supp. IV 1986) provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addi-

tion to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes –

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that –

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to

have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrants of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to–

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this

section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may–

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent

of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and

was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

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